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IN REPLY REFER TO

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FROM THE CLASSROOM*

TO: RD, R5
ARD-ES
Chief, Endangered Species
Bill Archambault, FOIA Coordinator

FROM: Robin Lepore *RL*

SUBJECT: Recent Decision Regarding Deliberative Process and Attorney Client Privileges as memorialized in E-mails in reviewing Agency Decision

Attached is a very instructive and valuable decision regarding internal FWS and FWS-SOL emails exchanged internally as a part of defining the extent of critical habitat for the Mexican Spotted Owl. I know that many of you feel that all we lawyers do is go on about administrative records and FOIA document-keeping, but this case is an excellent example of how the Service was able to prevail in decision to withhold some predecisional documents from the administrative record.

Please distribute this case to all the Endangered Species field staff, and to other program areas as well, as it applies to any agency e-mail or record involving the development of an agency decision.

Please note the following points from this case:

–In order to successfully invoke the Deliberative Process Privilege and the Attorney Client Privilege, Director Williams had to file a declaration explaining why he was claiming the privileges as to each document. While we have occasionally used a somewhat lower-level decision-maker than the Director or the Secretary, please bear in mind that all documents we may seek to protect will be reviewed by high-level administrators as well as the Court.

–This case related to what documents would be withheld from the administrative record. It was not a FOIA case, but FOIA also has similar protections. The tests for whether a document qualifies as privileged/withholdable is similar in both situations, see page 5 for the four factors for the deliberative process privilege and page 7 for the eight elements for the attorney-client privilege.

–In both situations (Administrative Record assemblage and FOIA responses) if a document has ever been released, the privilege is waived, so it is very important that e-mails are not distributed outside of the agency nor that FOIAs be responded to carelessly, or the document will be

determined to be ineligible for protection.

–Unless you have been to a recent FOIA training program, you may be unaware that the FOIA rules regarding withholding have been revised by the current administration. Attorney General Reno’s FOIA directives have been reversed and now, instead of having to document why you are withholding a document and what harm would occur, Attorney General Ashcroft has now instructed us to explain why a document can be released and to make a finding that a harm will not occur from release—“discretionary decisions to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.”

See: www.usdoj.gov/oip/foiapost/2001foiapost19.htm.

–Remember your e-mail etiquette!! People often are less judicious in e-mail in their choice of words or references to other people, agencies, organizations, etc. than they would ever be in signed agency correspondence or in face-to-face encounters. Do not use any terminology or discuss irrelevant matters, unless you are prepared to find the text made fully public. (That doesn’t mean that a cheerful mention of some human interest is unreasonable (“Hi, Joe, I hope your son’s arm is feeling better.”) but just bear in mind that e-mails on official topics are just as much an agency record as a letter signed by the Secretary.

–We won the case. Always nice. But, as you can see from the Opinion, every document was discussed and the basis for invoking the privilege was explained. Clearly, the Service and the Solicitor’s Office put in a lot of work to support the sanctity of the agency decision-making process. Our Office and DOJ remain available to you in defending your agency in all litigation, but it obviously helped here that the Court was impressed by the fact that the documents did not reflect “bad faith” nor selective withholding of those documents damaging to the agency. It always helps when the underlying file is solid.